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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

( Civil Appellate Jurisdiction )

Friday, the Tenth day of November Two Thousand and Twenty Three

PRESENT

The Hon`ble Mr.Justice P.B.BALAJI

MP(MD) No.1 of 2011

IN

SA No.1717 of 1993

VILATHIKULAM PANCHAYAT
VILATHIKULAM,
THROUGH ITS EXECUTIVE OFFICER ... PETITIONER/APPELLANT

Vs

KARUPPUSAMY PILLAI (DIED)

1.M.JOHN
2 A.K.SHANMUGAM PILLAI
3 V.SUBRAMANIAM
4 PONNIAH PILLAI
5 JAYARAMAN ... RESPONDENTS/RESPONDENTS

Miscellaneous Petition filed praying that in the circumstances stated therein and in the affidavit filed therewith the High Court may be pleased to Condone the delay of 1532 days in filing the petition to set aside the order dated 20/01/2007 made in SA.No.1717/1993 on the file of this Honourable Court for non prosecution.

Prayer in S.A.No.1717/1993 :

To prefer this memorandum of Second Appeal to this Hon'ble Court against this judgement and decree of the Learned Subordinate Judge of Tuticorin made in A.S.No.47 of 1988 dated 22.04.1991 reversing judgment and decree of the learned District Munsif of Kovilpatti made in O.S.No.1065 of 1979 dated 14.10.1987.

ORDER : This petition coming up for orders on this day, upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of MR.VEERA KATHIRAVAN, Additional Advocate General-III assisted by MS.PARAMESHWARI, Advocate for the petitioner and of MR.N.TAMILMANI,

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Advocate on behalf of the Respondent Nos.6 to 9, the court made the following order:-

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|---|---|
| Reserved on | **03.11.2023** |
| **Pronounced on** | **10.11.2023** |

The above petition has been taken out by the petitioner/appellant to condone the delay of 1532 days in filing the petition to set aside the order dismissing the second appeal for default on 20.01.2007.

2. The said application is seriously opposed by the respondents. A detailed counter affidavit has been filed by the seventh respondent for himself and on behalf of the respondents 6, 8 and 9.

3. I have heard Mr.Veera Kathiravan, learned Additional Advocate General-III assisted by Ms.Parameshwari, learned counsel for the petitioner/appellant and Mr.N.Tamilmani, learned counsel for the respondents 6 to 9.

4. Mr.Veera Kathiravan, learned Additional Advocate General would submit that the second appeal was originally pending on the file of the Principal Seat of this Court and consequent to the constitution of the Bench here at Madurai, the second appeal appears to have been transferred and thereafter listed for hearing. No notice was served on the appellant and he was therefore under the impression that the second appeal was pending and only when the Execution Petition in E.P.No.7 of 2009 was filed and the respondents sought to demolish the temporary structures, the

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petitioner engaged an Advocate in the Execution Proceedings, who advised him to defend the Execution Petition. According to the petitioner, the Execution Petition came to be allowed and thereafter, he approached the counsel to find out the stage of the second appeal and only at that point of time, he came to know that the second appeal had been listed for hearing and in view of no appearance on behalf of the appellant, the second appeal came to be dismissed for non-prosecution on 20.01.2007. Further, it was also stated that the Advocate, who represented the petitioner at Chennai, also died. There was no occasion for the petitioner to know about the transfer of the second appeal from the Principal Seat to the Bench of this Court and that was the reason why, there was no appearance in the second appeal, which resulted in dismissal of the second appeal. The learned Additional Advocate General would also place reliance on the decision of the Hon'ble Supreme Court in Sri Prabodh Ch.Das and another Vs. Mahamaya Das and others reported in 2020(1) CTC 237.

5. Per contra, the learned counsel for the respondents 6 to 9 would submit that even in the Execution Petition filed by the respondents, they have clearly mentioned that the second appeal was dismissed for non-prosecution on 20th January 2007. He would also state that thereafter the petitioner chose to contest the Execution Petition for two years and at no point of time steps were taken to restore the second appeal.

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Further, he would also state that at the time of transfer of the case from the Principal Seat to the Madurai Bench, the same was informed to all the litigants through written communication and therefore, the petitioner, that too, being a Government servant, cannot claim ignorance of the said transfer. In any event, the petitioner ought to have diligently followed up the case and there are absolutely no justifiable reasons assigned by the petitioner to condone the inordinate delay of 1532 days. He would therefore pray for dismissal of the application.

6. I have considered the rival submissions and also perused the records.

7. It is seen from the records that the suit was originally filed for the reliefs of declaration and mandatory injunction. The petitioner/appellant herein was the first defendant in the suit. The said suit was filed in the year 1979. The trial Court granted the relief of declaration and negatived the prayer for mandatory injunction. As against the said decree, the plaintiff alone preferred an appeal and the present appellant did not choose to challenge the same. In the first appeal proceedings, the relief of mandatory injunction was also granted in favour of the plaintiff, apart from confirming the decree of the declaration in favour of the plaintiff. It is only pursuant to the said grant of relief of the mandatory injunction, challenging the said judgment and decree of the first appellate Court, the second appeal came to be filed by the petitioner/appellant herein.

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8. No doubt, the second appeal was also filed a huge delay and the said delay was condoned by this Court and thereafter, the second appeal was taken up for hearing. In the meantime, the Madurai Bench of this Court was constituted and the second appeal, which was pending before the Principal Seat, was transferred to the file of this Bench. It is the case of the petitioner/appellant that he was totally unaware of the said transfer of the second appeal and that his counsel who was appearing in the Principal Seat also passed away and therefore, the delay was neither wilful nor wanton. Unfortunately, it is seen from the records that pursuant to the dismissal of the second appeal on 20.01.2007, an Execution Petition was filed by the respondents to execute the decree passed by the First Appellate Court granting the relief of mandatory injunction. The said Execution Petition was filed in the year 2009. The petitioner/appellant admittedly received notice in the said execution proceedings and appeared before the Executing Court and contested the Execution Petition upto 2011. In the year 2011, the Execution Petition was allowed and at that stage, the petitioner appears to have woken up and filed the present petition to condone the delay in setting aside the order of the dismissal of the second appeal.

9. Even if the reasons assigned by the learned Additional Advocate General that the petitioner was unaware of the transfer of the appeal to the Madurai Bench is accepted, the delay between 2009 and 2011 stands unexplained. When the execution

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petition was filed after dismissal of the second appeal in 2009, the petitioner was put on notice about the said dismissal of the second appeal. In fact, a categorical statement is made in the affidavit filed in support of this application that in the Execution Petition, the petitioner's counsel advised the petitioner that it is enough if the Execution Petition is contested. Therefore, the petitioner was conscious of his right to have the second appeal restored to file even on the date of receipt of the notice in execution proceedings and for reasons best known to the petitioner / appellant, no steps were taken in that regard and instead the Execution Petition alone was contested and after suffering an order in the Execution Petition, the present application has been filed to condone the delay of 1532 days. The delay is not only inordinate, but also not satisfactorily explained. Absolutely no cause, muchless, just cause has been shown for not approaching this Court at the earliest point of time to seek restoration of the second appeal, subsequent to the same being dismissed for non-prosecution.

10. Insofar as the decision relied on by the learned Additional Advocate General, the ratio laid down by the Hon'ble Supreme Court in the said Sri Prabodh Ch.Das's case referred to supra, was only that the second appeal, in the absence of the counsel for the plaintiff, should not be dismissed on merits but can be dismissed only for non -prosecution. Here, admittedly the second appeal was not dismissed on

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merits, but only for non-prosecution. Therefore, the ratio laid down by the Hon'ble Supreme Court in the said Sri Prabodh Ch.Das's case will have no application to the facts of the present case.

11. In fine, I do not find any sufficient cause shown by the petitioner/appellant to have the huge delay of 1532 days condoned. Consequently, M.P.No.1 of 2011 is dismissed.

sd/-
10/11/2023

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/11/2023

Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

cp

TO
1 THE SUBORDINATE JUDGE, THOOTHUKUDI.
2 THE DISTRICT MUNSIF, KOVILPATTI.

+1. C.C. to M/S.M.PARAMESHWARI, Advocate SR.No.51245[F]
+1. C.C. to M/S.N.TAMILMANI, Advocate SR.No.51154[F]

ORDER IN
MP(MD) No.1 of 2011
IN SA No.1717 of 1993
Date :10/11/2023

RS/SKN/SAR-(27.11.2023) 7P 5C
Madurai Bench of Madras High Court is issuing
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